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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAURICE LEE ROBINS, Defendant and Appellant.	E054061 (Super.Ct.No. RIF10003813) OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Maurice Lee Robins appeals from his conviction of six counts of second degree robbery (Pen. Code,[1] § 211) with associated enhancements (§§ 12022, subd. (a)(1), 667.5, subd. (b).) Defendant contends (1) the evidence was insufficient to support his convictions, or, in the alternative, he received ineffective assistance of counsel because his trial counsel failed to move to suppress identification testimony; (2) the trial court improperly coerced the jury into returning a guilty verdict; (3) the trial court abused its discretion in failing to impose concurrent sentences for counts 2 through 6; (4) the trial court erred in failing to stay sentences under section 654 for counts 2 through 6; and (5) the trial court abused its discretion in refusing to recommend fire camp.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

On September 21, 2010, Gosch Towing & Recovery (Gosch) held a lien auction to sell unclaimed automobiles. Attendees were required to pay a refundable entrance fee of $100 and to pass through a gate. The auction resulted in proceeds of $26,980 in cash. When the sale ended, attendees who had not purchased vehicles lined up to be reimbursed for their entrance fees, and purchasers went inside the office to pay for their vehicles and fill out paperwork.

[1] All further statutory references are to the Penal Code.

While buyers were checking out, Gosch employee Robert Weston saw two African-American men who had been sitting outside the office for about 30 minutes. One of the men, whom Weston later identified as defendant, was sitting on a chair that was propping the office door open, talking on a cell phone and looking into the office. Gosch employee Veronica Guevara had seen two men outside the office after the auction. One man who was sitting down had darker skin, cornrows, and a goatee. Guevara thought the men were acting suspicious, so she alerted her supervisor, Frank Bulleit.

Defendant asked Weston if he could use the restroom, and Weston let him come inside the office. Defendant used the restroom and returned outside. After the auction attendees had left, the second man entered the office, pointed a gun at the people inside, and told everyone to get down. Defendant entered right behind him. The man with the gun told them not to look at him, and he fired a shot into the ceiling. Five people in the office, Weston, Bulleit, Guevara, Kathryn Cyr, and Kimberly Kinney, got down on the floor. Weston did not lie down but got on his knees and watched what both robbers were doing. He saw defendant grab the supervisor, Gabriel Estrella, from the back area and make him get down also. Defendant grabbed the cash box, which contained about $26,000 and receipts, and collected the employees' cell phones, using both hands. The two men left, and Weston called 911 from the office telephone.

Weston told the 911 operator that one robber was a Black heavyset man in his late 20's or early 30's, with cornrows in his hair and wearing a brown sweater and blue jeans. Weston described the second robber as short, in his mid-20's, wearing a black "doo-rag," blue jean shorts, and a black shirt with colored writing. Later that day, he described the

first robber who had grabbed the cash box as wearing a long-sleeved brown sweatshirt and blue jeans.[2] At the preliminary hearing, Weston described the first robber as a "[t]all, [B]lack gentleman" who was "wearing black jeans, a black sweater-type shirt, had the braids in his hair, and I believe he had a mustache." He further described the first robber as being "stocky," about six feet five inches to six feet seven inches tall, with braided hair "about two or three inches off the back," and a mustache. That man was wearing black jeans and a "dark-colored sweater-type shirt." He "wouldn't say a knit sweater," but "[j]ust a sweater. I can't say sweatshirt or—it was a dark-colored sweater that had long sleeves." At trial, Weston identified defendant as one of the robbers and described him at the time of the robbery as having braided cornrows "with a little bit hanging down in the back" and a goatee and mustache, and wearing a "brownish sweater looking shirt" and blue jeans. The probation report indicates defendant is six feet two inches tall and weighing 230 pounds.

All six robbery victims were shown a photographic lineup; however, Weston was the only one who identified anyone as one of the robbers, and he identified defendant. None of the other victims identified defendant at trial. Bulleit had seen the robber with the gun enter and immediately got down on the floor. He did not look up at the person who took his phone. Cyr did not see the robbers' faces. Kinney got down on the floor behind a chair and did not look back up while the robbers were there. She did not look at the man who took her phone. When the second man entered the office with a gun,

[2] He clarified at the preliminary hearing that he "may have said blue jeans at the time," but he "believe[d] they were black jeans."

announced it was a robbery, and fired the gun, Guevara dropped to the floor under her desk. She was looking down and did not see who took her cell phone. Estrella did not testify.

Sheriff's deputies had the cell phone carrier "ping" the cell phones to track their locations. They found Guevara's Blackberry near a freeway intersection a mile or two from Gosch and found Weston's phone in a park about eight miles from Gosch. From Guevara's Blackberry, forensic technicians recovered latent partial fingerprints of a person's left index finger.

Fingerprint examiner Patricia Campos entered the latent prints into the Automated Fingerprint Identification System, which identified defendant, as well as 18 other potential candidates, as a possible match. Campos performed a manual analysis, which yielded 12 points of comparison for the first print and 13 points of comparison for the second. Campos's supervisor verified Campos's results. Campos testified that a minimum of eight matches on separate points of comparison are required to confirm an identification.

Based on the identification information, Detective Flores prepared a six-pack photographic lineup. Weston selected defendant's photograph as "the one that came in and got the money." The detective showed the same lineup to four other victims,[3] but they were not able to identify defendant or his accomplice.

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[3] Cyr was not shown the photographic lineup, but she had told detectives she would not be able to recognize the robbers.

B. Defense Evidence

Defendant introduced the expert testimony of Mitchell Eisen, a psychologist, concerning factors that compromise the reliability of eyewitness identification.

Defendant's mother testified that defendant is predominantly right handed, although she conceded he performs some tasks with his left hand as well, and there is nothing wrong with his left hand.

C. Verdicts and Sentence

The jury found defendant guilty of six counts of robbery (§ 211) and found true that a principal had been armed with a firearm (§ 12022, subd. (a)(1)) as to each count. In bifurcated proceedings, defendant admitted a prison prior. (§ 667.5, subd. (b).)

The trial court sentenced defendant to 11 years eight months in prison, comprising the middle term of three years for count 1 with a consecutive enhancement of one year for the armed enhancement as to that count, a consecutive term of one year for each of counts 2 through 6, a consecutive enhancement of four months for the armed enhancement as to each of those counts, and a consecutive term of one year for the prison prior.

III. DISCUSSION

A. Sufficiency of the Evidence

Defendant contends the evidence was insufficient to support his convictions because four witnesses testified they were unable to identify him; Weston's various descriptions were inconsistent as to the suspect's clothing and facial hair, and Weston's

identification of him was the product of an impermissibly suggestive photographic lineup. Defendant also challenges the accuracy of the fingerprint evidence.

1. Standard of Review

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

2. Photographic Lineup

Defendant argues that the photographic lineup shown to Weston during the pretrial identification procedure was so impermissibly suggestive that it tainted his subsequent in-court identification, making it unreliable and violative of his constitutional right to due process. (*People v. Blair* (1979) 25 Cal.3d 640, 659 (*Blair*).)

"'[D]efendant has the burden of showing that the identification procedure was unduly suggestive and unfair "as a demonstrable reality, not just speculation." [Citation.] A due process violation occurs only if the identification procedure is "so impermissibly

suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [Citation.]'" (*People v. Johnson* (2010) 183 Cal.App.4th 253, 271-272.) "'[A]n identification procedure is considered suggestive if it "caused defendant to 'stand out' from the others in a way that would suggest the witness should select him."'" (*Id.* at p. 272.)

In *Blair*, the court rejected the defendant's argument that showing a witness four sets of photographs, three of which included the defendant's picture, impermissibly tainted the witness's subsequent identification of the defendant in a live lineup. The court stated, "Cases which have held lineups to be impermissibly suggestive involved differences between the participants more glaring than those present here." (*Blair*, *supra*, 25 Cal.3d at p. 661, fn. omitted.) The court described those cases: "In *People v. Caruso* (1968) 68 Cal.2d 183, 187 . . . [the] defendant was 6 feet 1 inch tall, weighed 238 pounds, and was of Italian descent, with a very dark complexion, and dark, wavy hair. He was placed in a four-man lineup in which no one was his size, none had his dark complexion, and none had dark, wavy hair. In *United States* ex rel. *Cannon v. Smith* (W.D.N.Y. 1975) 338 F.Supp. 1201, 1204, only [the] defendant wore a distinctive green shirt, and the victim had described the assailant as having worn a shirt of that color. In *Martin v. State of Ind.* (N.D. Ind. 1977) 438 F.Supp. 234, 236-237, [the] defendant, described by the victim as a 'dark-skinned colored man,' tall, heavy, and between 32 and 36 years old, was placed in a 12-man lineup in which the only other black aside from defendant was 18 years old and 5 feet 3 inches tall. [The] [d]efendant alone was requested to speak, and only he wore prison garb. In *State v. Henderson* (1977) 116 Ariz. 310 . . . defendant who

was 36 years old, was placed in a lineup with five men between the ages of 20 and 24; he was larger and heavier than others in the lineup. However, the identification made at the lineup was held to be admissible because other factors suggested that it was reliable." (*Blair*, *supra*, at p. 662 fn. 19.) The court stated that although "the 'sine qua non of lineup fairness' is similarity in appearance between the accused and the other participants . . . 'there is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance.' [Citations.]" (*Id.* at p. 661.)

Defendant argues that among the six photographs in the lineup, three were of light-skinned men; one had cornrows that did not hang; one was too young; and two were not heavy set. We have examined the photographic lineup, and we disagree that it was impermissibly suggestive. All the men have generally similar cornrow hairstyles, and all appear to be generally the same age. While the six men represent a range of skin colors, defendant is not the darkest-skinned of the group. Three of the men, including defendant, have mustaches and goatees. Since the photographs show only the subjects' heads and shoulders, the photographs do not show whether or not the subjects are "heavyset." Thus, in our view, the lineup was not impermissibly suggestive. Moreover, as the People point out, if in fact the lineup *had* been suggestive, it would have been expected that other witnesses would have selected defendant's photograph; however, none was able to do so.

3. Fingerprint Evidence

Defendant challenges the fingerprint evidence on the grounds, among others, that (1) only 12 characteristics of his prints matched the partial latent print on the Blackberry, whereas, a fingerprint may include up to 150 distinct characteristics; (2) the computer had

identified 18 potential matches, including defendant; and (3) the print on the Blackberry was from a left index finger, whereas, defendant has a dominant right hand, and the location of the Blackberry showed it had been tossed a considerable distance, which would have required using his dominant hand. Those challenges are easily disposed of.

Campos testified as an expert that only eight matching characteristics are sufficient for identification; she found 12 matches, and a supervisor had verified her results. The credibility and weight of her expert opinion were solely matters for the jury to determine. (E.g., *People v. Flores* (2006) 144 Cal.App.4th 625, 633.)

As to the fact that the fingerprint was from an individual's left hand, Weston testified defendant used *both* hands when collecting the victims' cell phones. The jury could reasonably have concluded the fingerprint was put on the phone at that time rather than when it was being discarded.

4. Sufficiency of Evidence

The fact that there were discrepancies in Weston's various descriptions does not make his identification unreliable. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 ["Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime."].) Defense counsel cross-examined Weston extensively on the identification process, as well as the conditions under which he had observed defendant. In addition, he presented expert testimony on the pitfalls of eyewitness identification, and the trial court instructed the jury before and after the presentation of evidence on the same factors. The trial court specifically instructed, "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider

whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember." There was nothing inherently improbable about Weston's testimony, and the jury chose to believe that testimony, which was corroborated by the fingerprint evidence. In sum, we conclude substantial evidence supports defendant's convictions.

B. Assistance of Counsel

Defendant contends he received ineffective assistance of counsel because his trial counsel failed to move to suppress identification testimony.

To establish ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-689.) We overturn a defendant's conviction because of ineffective assistance of counsel only if counsel could have had no rational strategic purpose for the challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Because we have concluded the photographic lineup was not unduly suggestive, we now conclude counsel did not provide ineffective assistance in failing to move to suppress the resulting identification because such a motion would have been futile. (*People v. Diaz* (1992) 3 Cal.4th 495, 562 [failure to object to admissible evidence is not ineffective assistance of counsel because an objection would have been futile].)

C. Instruction to the Jury

Defendant contends the trial court improperly coerced the jury into returning a guilty verdict.

1. Additional Background

The jury began deliberating at about 4:05 p.m. on May 16, 2011. The next day at 10:25 a.m., the jury sent a note to the court requesting Weston's testimony and testimony "on what was found in vehicle regarding receipts." (Capitalization omitted.) The trial court agreed to provide the requested testimony.

At 10:53 a.m., the jury sent another note requesting the testimony of Campos, the fingerprint examiner. The trial court agreed to provide the requested testimony.

At 3:02 p.m., the jury sent a third note asking if the jury was to decide the section 12022, subdivision (a)(1) issue and asking "what if we can't come to agreement on some counts." (Capitalization omitted.) The trial court, with counsel present, answered the first question in open court. The trial court then asked the jurors individually whether each of them felt there was a reasonable probability that they could arrive at a verdict. The jurors indicated they were deadlocked, and the foreperson stated the vote was 11 to 1. The trial court delivered a lengthy instruction "[t]o assist [the jury] in [its] further deliberations.[4] The jury retired to deliberate further, and at 3:45 p.m., the jury announced it had reached a verdict.

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[4] The trial court instructed the jury: "It's been my experience that on more than one occasion that a jury which initially reported it was unable to reach a verdict was ultimately able to arrive at verdicts on one or more of the counts before it.

"To assist you in your further deliberations, I'm going to instruct you as follows: Your goal as jurors should be to reach a fair and impartial verdict if you are able to do so based solely on the evidence presented and without regard for the consequences of your verdict regardless of how long it takes you to do so.

"It is your duty as jurors to carefully consider, weigh and evaluate all the evidence presented at trial, to discuss your views regarding the evidence, and to listen to and

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consider the views of your fellow jurors. In the course of your further deliberations, you should not hesitate to reexamine your own views or to request your fellow jurors to reexamine theirs. You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest other jurors change their view if you are convinced they are wrong.

"Fair and effective jury deliberations requires a frank and forthright exchange of views.

"As I previously instructed you, each of you must decide the case for yourself, and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you can do so without violence to your individual judgment.

"Both the People and the defendant are entitled to the individual judgment of each juror. As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way you deem appropriate. May I suggest that since you have not been able to arrive at a verdict using the methods that you have chosen, that you consider a change to the methods you have been following. At least temporarily try some new methods. "For example, you may wish to consider having different jurors lead the discussions for a period of time, or you may wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side's position and vice versa. This might enable you to bet[ter] understand the other side's position.

"By suggesting you should consider changes in your methods of deliberation, I want to stress I am not dictating or instructing you as to how to conduct your deliberations. I merely find you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views and consider and understand the views of the other jurors.

"I also suggest you reread CALCRIM 200 and 3550. These instructions pertain to your duties as jurors and make recommendations as to how you should deliberate.

"The integrity of a trial requires that jurors at all times during their deliberations conduct themselves as required by the instructions. CALCRIM 200 defines the duties of a juror. The decision the jury renders must be based on the facts and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source.

"A fact is something proved by the evidence or by stipulation. Second, you must . . . apply the law I state to you to the facts as you determine them and in this way arrive at your verdict.

"You must accept and follow the law as I state it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. CALCRIM 3550 defines the jury's duty to deliberate.

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2. Analysis

In *People v. Gainer* (1977) 19 Cal.3d 835, disapproved of on another ground as stated in *People v. Valdez* (2012) 55 Cal.4th 82, 163, the court held "[I]t is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Gainer, supra,* at p. 852, fn. omitted.) The *Gainer* court also disapproved any reference to "the expense and inconvenience of a retrial." (*Ibid.*)

Defendant does not point to any specific language in the trial court's instruction that violates *Gainer*'s precepts; rather, defendant argues the trial court's statements "revealed a judicial preference for a verdict, which violated the spirit, if not the letter, of *Gainer*." However, as defendant acknowledges, the instruction the trial court gave to the jury was consistent with instructions approved in *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1120, and *People v. Whaley* (2007) 152 Cal.App.4th 968, 982-983.) We

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"The decisions you make in this case must be based on the evidence received in the trial and the instructions given by the Court. These are the matters this instruction requires you to discuss for the purpose of reaching a verdict. CALCRIM 3550 also is an instruction which recommends how jurors should approach their task. You should keep in mind the recommendation this instruction suggests when considering the additional instructions, comments, and suggestions I have made in the instructions now presented to you.

"I hope my comments and suggestions may be of some assistance to you.

"You are ordered to continue your deliberations at this time. If you have any other questions, concerns, requests or any communications you desire to report to me, please put those in writing on the form my deputy has provided you with. Have them signed and dated by the foreperson and then please notify the deputy. Thank you, ladies and gentlemen."

agree that the instruction the trial court gave was proper under those cases, and defendant has given us no reason to conclude those cases were wrongly decided. There was no error.

D. Concurrent Sentences

Defendant contends the trial court abused its discretion in failing to impose concurrent sentences for counts 2 through 6.

Before sentencing, defense counsel filed a sentencing memorandum requesting concurrent terms based on the facts that "there was independent relationship between [defendant's] objective and the crimes in each count, a single act of threat of violence, and the fact that the crimes all occurred at one location and at the same time."

We review the trial court's choice to impose consecutive terms under the deferential abuse of discretion standard. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

The trial court found the fact that there were multiple victims warranted consecutive sentences for each count. The trial court may properly consider as a circumstance in aggravation that the offenses involved multiple victims. (*People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1739.) Only one factor in aggravation is necessary to support consecutive sentencing. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) We therefore find no abuse of discretion.

E. Section 654

Defendant contends the trial court erred in failing to stay sentences under section 654 for counts 2 through 6.

Section 654 does not preclude multiple punishment when a defendant committed crimes of violence against multiple victims even if he had a single principal objective during an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 595.) There was no error.

F. Fire Camp

Defendant contends the trial court abused its discretion in refusing to recommend fire camp.

Defense counsel requested the trial court to recommend that defendant serve his sentence at fire camp. The trial court denied the request, explaining, "I'm not comfortable doing that given the fact that he really didn't make any try that has been revealed to the Court that would indicate that he's interested in straightening out his life. So I'm sorry. I'm just not willing to do that."

As noted, defendant had prior convictions for disturbing the peace and carrying a concealed weapon. He received one year's probation for his misdemeanor offense of disturbing the peace (§ 415) in 2002. He initially received three years' probation for his November 2004 offense of carrying a concealed weapon; however, in March 2006, his probation was revoked, and he was sent to prison for two years. He was paroled in September 2006, but violated his parole and was returned to prison in November 2007. He was paroled in October 2008, but violated his parole and was returned to prison in April 2009. He was again paroled in September 2009 and discharged from parole in September 2010. Most significantly, within two weeks of his discharge from parole, he committed the instant offenses.

As the probation report noted, he has been granted multiple opportunities to alter his behavior. He nonetheless continually violated his probation and parole and was continually re-incarcerated. We find no abuse of discretion in the trial court's refusal to recommend fire camp.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MILLER
J.